To Be Argued By:
Edward Sawchuk
Time Requested: 15 Minutes

New York Supreme Court

APPELLATE DIVISION — SECOND DEPARTMENT

Docket No.
2015-03780

VITO AGOSTA and FUEL SYSTEMS DESIGN, LLC,

Plaintiffs-Appellants,

against

FAST SYSTEMS CORPORATION,

Defendant-Respondent.

BRIEF FOR DEFENDANT-RESPONDENT

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Suffolk County Clerk's Index No. 19067/13

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QUESTIONS PRESENTED

1. Whether the documents generated in the course of the transactions between the parties, together with the conduct of the parties, gave rise to an inference of an intent to contract. The Court below held in the affirmative.

2. Did the Court below correctly find that several relevant writings in the case contained "all of the elements of a binding contract," and hold that the Appellants failed to demonstrate as a matter of law that such writings, taken together, did not satisfy the statute of frauds?

3. In light of the Court's dismissal of the first, third, fourth and fifth counterclaims, is there any basis for these remaining counterclaims to stand? The Court below did not specifically answer this question, but implicitly answered "Yes."

PRELIMINARY STATEMENT:

Imprimis, the Respondent hastens to correct Paragraph 2 of the Appellant's CPLR § 5531 statement; The full names of the original parties are Vito Agosta and Fuel Systems Design, LLC, Plaintiffs, and FAST Systems Corporation and

Mark H. Schlam, Defendants. Per Stipulation dated 23 September 2013 [RA1], Mark H. Schlam was removed as a Defendant in his personal capacity, and the Caption of the case adjusted accordingly.

Moreover, Paragraph 5 of the Appellant's CPLR § 5531 statement characterizes the nature of the current action as "fraud and negligence;" as detailed in this Brief, the Respondent would also characterize the current action as being in the nature of breach of fiduciary duty and ownership of intellectual property.

The decision appealed from has been reported in full text form at *Agosta v. FAST Systems Corp.*, 2015 NY Slip Op 50107(U), 2015 N.Y. Misc. LEXIS 315 (Sup. Ct. Suffolk Co. 2015). Its full text is also available in the New York Law Journal's proprietary online database as Case No. NYLJ1202718428285.

It is the position of Defendant/Respondent FAST Systems Corporation ("FAST") [1] that Plaintiff/Appellant Vito D. Agosta ("Dr. Agosta"), acting personally and also through Plaintiff/Appellant Fuel Systems Design, LLC,

[1] "FAST" is properly spelled out in majuscules, being the acronym for "Fuel Additive Smart Technologies.

("FSD"), the Limited Liability Company Dr. Agosta controlled and continues to control, has reneged on his agreement to further the exploitation and monetization of Dr. Agosta's inventions and related technologies. Presentations were made to various prospective investors and funding sources, including SUNY Stony Brook and the office of Congressman Steve Israel [RA5 - RA13; AA157; AA391 - AA392]. Such marketing attempts are within the very broad discretion under the Business Judgment Rule of a corporation's Directors to promote their wares and services, *Bayer v. Beran*, 49 N.Y.S.2d 2 (Sup.Ct., N.Y. Co. 1944), and as such, are not subject to subsequent review by the courts, *Levandusky v. One Fifth Ave. Apartment Corp.*, 75 N.Y.2d 530, 553 N.E.2d 1317 (1990). Dr. Agosta acquiesced, if not actively participated, in FAST's marketing presentations to potential grant providers and investors, and also trademark development and registration. [2] Dr. Agosta explicitly chose to take a back seat to active

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[2] Patents and Trademarks often go hand-in-hand. *See, e.g.* Moshe H. Bonder, *Patent and Lanham Acts: Serving Two Legitimate Purposes or Providing an Indefinite Monopoly*?, 15 Alb. L.J. Sci. & Tech. 1 (2004); *see also Adamson v. Commissioner*, 5 T.C.M. (CCH) 1071, T.C.M. (RIA) 46286 (Tax Ct. 1946); *Gentile v. Gill*, 2013 Minn. App. Unpub. LEXIS 935 (Minn.App. 2013).

The use of trademarks and trade names is often intertwined with the exploitation and protection of patents. *E.g. Petersen v. Fee International, Ltd.*, 381 F. Supp. 1071, (W.D. Okla. 1974); *In re Albion Disposal, Inc.*, 152 B.R. 794, 816 (Bankr., W.D.N.Y. 1993); *L.A. Gear, Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117, 1993 U.S. App. LEXIS 2529, 25 U.S.P.Q.2d (BNA) 1913 (Fed. Cir. 1993), *cert. denied* 510 U.S. 908, 114 S. Ct. 291, 126 L. Ed. 2d 240 (1993). Laws of the states, including New York, can provide greater protection in such regard than that afforded under federal laws, *L.A. Gear* at 1134 - 1135. Species of intellectual property other than patent may continue to pertain and provide protection even after expiration of the patent. *Hubbell Inc. v. Pass & Seymour*, 883 F. Supp. 955, (S.D.N.Y. 1995), *certif. for appeal denied* 1995 U.S. Dist. LEXIS 11050 (S.D.N.Y. 1995).

involvement in the commercial aspects of the venture, preferring to limit his involvement in the venture to the technological aspects [AA 451, lines 12 - 20].

As discussed in greater detail below, Dr. Agosta's fiduciary status as an Officer, Director, and Shareholder in a close corporation is relevant to construing his words and actions in the relevant transactions.

The injunctive relief sought by the Plaintiff/Appellant would entail a disposition contrary to a determination already made by the U.S. Patent and Trademark Office (USPTO) [AA36, ¶¶ 37 -39]. As detailed further below, the USPTO determination carries a presumption of correctness, and the Plaintiff/Appellant failed to demonstrate the clear and convincing level of evidence required to overcome such a presumption.

The Appendix to the Plaintiff/Appellant's Brief in the instant Appeal, compiled by Counsel for the Plaintiff/Appellant, is devoid of certain relevant documents presented in connection with the Order appealed from. Accordingly, these are appropriately included in an Appendix to this instant Brief.[3] *See Cross*

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[3] References to the Respondent's Appendix will be designated herein as with the "RA" prefix, to distinguish them from the Appellant's Appendix, which will be designated with the "AA" prefix.

Westchester Development Corp. v. Sleepy Hollow Motor Court, Inc., 222 A.D.2d 644, 636 N.Y.S.2d 372 (2d Dept. 1995), *appeal denied*, 88 N.Y.2d 802, 667 N.E.2d 338, 644 N.Y.S.2d 688 (1996); *Kimberly-Clark Corp., v. Power Authority of the State of New York*, 34 A.D.2d 1095, 313 N.Y.S.2d 623 (4th Dept. 1970); *2001 Real Estate v. Campeau Corp.*, 148 A.D.2d 315, 538 N.Y.S.2d 531 (1st Dept. 1989).

STATEMENT OF FACTS:

While Plaintiff/Appellant's Brief in the instant Appeal asserts that "[t]he material facts are undisputed," the Defendant/Respondent does not necessarily endorse in all respects the version of the fact pattern so set forth by the Appellant. The Respondent's conception of the facts of the case as they differ from the Appellant's follow below, CPLR R. 5528(b).

The Appellant's Brief asserts that Plaintiff Vito Agosta ("Dr. Agosta") was "unrepresented by counsel" in connection with the 15 December 2011 transaction [Appellant's Brief at 4]. It is FAST's contention and understanding that the legal fees of Dr. Agosta paid by FAST to Heather Kress, Esq. did, in fact, entail

representation in the transaction. As discussed in this Brief, however, whether or not Dr. Agosta was represented by counsel is irrelevant.

The Respondent disagrees with the Appellant's assertion to the effect that there was no meeting of the minds, and no intent to be bound. As further detailed in this Brief (and in the Decision appealed from), Dr. Agosta's conduct, including acquiescence and participation in corporate affairs and marketing activities, evinced an agreement sufficient to warrant enforcement by the Courts.

POINT I: Plaintiff Dr. Agosta had unclean hands from his breach of his fiduciary duties to defendant Corporation:

At the time of the relevant events (and continuing until the drafting of this Memorandum), Dr. Agosta was an Officer, Director, and Shareholder in defendant FAST Systems Corporation. It is beyond cavil that officers and directors are fiduciaries with respect to the corporation, and their duties include a duty of loyalty to the corporation. Shareholders of a close corporation have fiduciary duties towards one another and toward the corporation similar to those of partners in a partnership. *Young v. Chiu*, 49 A.D.3d 535, 536, 853 N.Y.S.2d 575) (2d Dept. 2008); *In re Validation Review Associates, Inc.*, 223 A.D.2d 134, 138, 646 N.Y.S.2d 149, 151 (2d Dept. 1996), *rev'd on other grounds* 91 N.Y.2d 840, 690

N.E.2d 487, 667 N.Y.S.2d 678, (1997); Greer v. Greer, 124 A.D.2d 707, 708, 508 N.Y.S.2d 217, 219 (2d Dept. 1986); *Motherway v. Cartisano*, 2014 N.Y. Misc. LEXIS 2145 at *8 - *9, 2014 NY Slip Op 31215(U) at *4 (Sup. Ct., Suffolk Co. 2014) (Emerson, J.). This fiduciary duty extends beyond situations of conflicts known with certainty, and even covers possible speculative conflicts, *Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 466, 539 N.E.2d 574, 576, 541 N.Y.S.2d 746, 748 (1989). Simple honesty does not suffice; the fidiciary must proactively assert the interests of his or her principal, "the punctilio of an honor the most sensitive" being the standard. *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928). As a shareholder in a close corporation and, a fortiori, as an Officer and a Director, Dr. Agosta was under fiduciary duty to not place his personal interests in a position of conflict with those of the corporation. *Fender v. Prescott*, 101 A.D.2d 418, 422 - 423, 476 N.Y.S.2d 128, 132 (1st Dept. 1984), *aff'd* 64 N.Y.2d 1079, 479 N.E.2d 249, 1985 N.Y. LEXIS 14209, 489 N.Y.S.2d 904 (1985).

The Verified Answer to the Amended Complaint [AA104, ¶ 84]. counterclaims that "On information and belief, Dr. Agosta did engage in discussions and/or negotiations, with one or more third parties, with the intent to have such third parties promote, market, and exploit the Inventions in lieu of and/or to the exclusion of [Defendant FAST Systems]" and that "Dr. Agosta does

not have clean hands in the instant dispute." [AA105, ¶ 85]. These allegations were undenied in the Plaintiffs' Reply of 17 October 2013, despite the fact that other counterclaim allegations were in fact specifically denied in said Reply [AA116, ¶ 1].[4] Accordingly, the Defendant's counterclaim that Dr. Agosta held discussions with third parties with the intent to enter into agreements contrary to Defendant FAST's interests must be deemed as admitted, C.P.L.R. § 3018(a), and Dr. Agosta cannot now be heard to deny that he did in fact engage in such activities, *Nopper v. Nopper*, 50 N.Y.2d 1009, 409 N.E.2d 1355, 431 N.Y.S.2d 681 (1980). Inasmuch as Dr. Agosta stood in a fiduciary capacity to FAST as an officer, director, and shareholder in a close corporation, such admitted activities constituted a breach of his fiduciary duties, *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928).

Dr. Agosta's fiduciary duty towards FAST, and his breach thereof, carry various ramifications:

A. Nonentitlement to injunctive relief: The Plaintiffs now seek injunctive relief, which is equitable in nature. Inasmuch as Dr. Agosta's aforestated misconduct pertained directly to the matter in litigation, and FAST was

[4] The denials contained in Paragraph 1 of the Reply entail "Paragraphs 87-112 inclusive." The relevant counterclaims entail Paragraphs 84 and 85.

injured thereby, the equitable relief now sought by Plaintiffs must not be granted because Dr. Agosta has unclean hands, *Weiss v. Mayflower Doughnut Corp.*, 1 N.Y.2d 310, 316, 135 N.E.2d 208, 210, 152 N.Y.S.2d 471, 474 (1956), *De Candido v. Young Stars, Inc.*, 10 A.D.2d 922, 200 N.Y.S.2d 695 (1st Dept 1960).

B. Assignment of Invention to FAST:

Much ado was made in the litigation below over whether a certain Assignment of Invention document executed by Dr. Agosta on 15 December 2011 [AA53 - AA54] was signed by him in his individual capacity, or in his capacity as the President of Fuel Systems Design, LLC. This point of contention was duly noted from the Bench in the Decision now under appeal, [*Agosta v. FAST Systems Corp.*, 2015 NY Slip Op 50107(U), n. 1 at *10, 2015 N.Y. Misc. LEXIS 315 at *2 (Sup. Ct. Suffolk Co. 2015) [AA5]. Dr. Agosta's fiduciary duty towards FAST renders the capacity in which he executed the document irrelevant because his fiduciary relationship imposed upon him the obligation to do all in his power to effect the assignment of the patent to FAST.

C. Dr. Agosta's Claims for Compensation for his Labors:

Dr. Agosta's breach of fiduciary duty disqualifies him from claiming any compensation at all in connection with any employer-employee relationship with

FAST, *South Pierre Associates v Meyers*, 12 Misc. 3d 955, 820 N.Y.S.2d 485 (N.Y.C. Civ. Ct. N.Y. Co. 2006) and cases cited therein.

D. Construction of Dr. Agosta's Intent in Construing his Transactions with FAST: [As further discussed in Point III, the *Spirt* and *Gupta* cases cited in the Appellants' Brief are inapposite because the parties in those cases did not stand in fiduciary relationships as Dr. Agosta stood with respect to FAST.].

POINT II: Plaintiff Dr. Agosta must be held to the legal consequences of his agreements.

Dr. Agosta unabashedly purports himself to be an experienced "consultant and contractor" to various industrial, commercial, and academic entities [AA19, ¶ 3]. There is no dispute to those contentions, nor to his contentions that he holds a Ph.D. degree and has had significant service as a university professor [AA19, ¶ 3].

An accomplished businessperson is presumed to understand the implications of his or her agreements. *Guerra v. Astoria Generating Co.*, 8 A.D.3d 617, 779 N.Y.S.2d 563 (2d Dept. 2004); *Huang v. Cheng*, 182 A.D.2d 600, 583 N.Y.S.2d 370, (1st Dept. 1992), *appeal denied* 80 N.Y.2d 760, 605 N.E.2d 874, 591 N.Y.S.2d 138 (1992); *Geary v. Rueger*, 2004 U.S. Dist. LEXIS 20063 at *23 (E.D.

Pa. 2004). People of intellect and erudition, including college professors, are held to similar expectations. *D'Andrea v. Hawaii*, 453 Fed. Appx. 749 (9th Cir. 2011), *cert. denied* ___ U.S. ___, 132 S. Ct. 2395, 182 L. Ed. 2d 1021 (2012); *Super 8 Worldwide, Inc. v. American Lodging Partners, Inc.*, 2011 U.S. Dist. LEXIS 7007 at *22 - *23 (N.D. Ill. 2011). Dr. Agosta contends that his engagement of Heather Kress, Esq. was for the purpose of forming FSD [AA511 - AA512]. This constitutes an implicit admission that Dr. Agosta, with all of his aforementioned expertise, experience, and erudition, already had experience in engaging counsel to advise him regarding his legal affairs. For the reasons stated above, even if the engagement of Heather Kress, Esq. was limited to the formation of FSD, Dr. Agosta should still be held to the legal consequences of his transactions with FAST; it is irrelevant whether Dr. Agosta was or was not represented by counsel in his transactions with FAST.

Dr. Agosta testified that he did not read the Assignment of Invention document before he signed it:

> Q. Did you have a meeting with Mr. Likourezos and Mr. Schlam and maybe other people on the 15th of December, 2011?

A. Yes, I did.

Q. What transpired at that meeting?

A. What I remember is George coming into the room and I remember Mr. Schlam giving me a piece of paper and asked me to sign it, that was the assignment of my patent to Fast. And then I didn't read the paper, I had no need to because Mr. Likourezos was a lawyer and an officer of the company and Schlam was an officer of the company. And I felt between the two of them I had a valid legal document.

Q. Would this be a facsimile of a paper that you signed (handing)?

A. This is a copy of a paper signed.

MR. CAHN: He wants to know if that is the document, what he has just handed you, is a copy of the document that Mr. Schlam and Mr. Likourezos gave to you at that meeting on December 15, 2011 and
asked you to sign it?

A. Yes. And Mr. Schlam gave me the paper not Mr. Likourezos.

Q. Would that be your signature?

A Yes.

[Document was marked as Defendant's Exhibit D at deposition,

Assignment of Invention.]

[AA366, line 22 - AA368, line 2.] .

Q. You have your signature here, were you signing it as an officer of any company or corporation or limited liability company or were you signing it on your own behalf?

MR. CAHN: Do you mean did he understand which way he was signing the paper or did he have any understanding about how he was signing the paper and in what capacity he was signing the paper. Is that your question?

MR. RYESKY: Yes.

A. I assumed the papers were legal properly filled out by the lawyer, by Mr. Schlam and I did not read it. I just signed it as a matter of course as Vito Agosta, I suppose.

[AA368, line 22 - AA369, line 13].

Dr. Agosta's words and actions, both contemporaneous with and subsequent to his signing of the various papers, can be reasonably construed as assent to an agreement. *See, e.g. Flores v. Lower East Side Service Center*, 4 N.Y.3d 363, 368, 828 N.E.2d 593, 795 N.Y.S.2d 491 (2005). It is of no consequence if, in his mind, Dr. Agosta entertained contrary thoughts, ideas, and intentions; he must be bound by the meaning exuded by his words and actions. *Hotchkiss v. National City Bank of New York*, 200 F. 287, 293 - 294 (2d Cir. 1911), *aff'd sub nom. National City Bank of New York v. Hotchkiss*, 231 U.S. 50 (1913); *Gillman v. Chase Manhattan Bank*, 135 A.D.2d 488, 491 - 492, 521 N.Y.S.2d 729, 732 (2d Dept. 1987).

Dr. Agosta is conclusively bound by his signature on the document. If he failed to read it, or to engage counsel to read or interpret for him, this is his own folly, of which he must bear the consequences. *Gillman v. Chase Manhattan Bank*, 135 A.D.2d 488, 491 - 492, 521 N.Y.S.2d 729, 732 (2d Dept. 1987); *see also Dambmann v. Schulting*, 75 N.Y. 55, 61 - 62 (1878). In view of his actions and words, he cannot now be heard to say that his mind never actually assented to the terms of the document he signed. *Pimpinello v. Swift & Co., Inc.*, 253 N.Y. 159, 162 - 163, 170 N.E. 530, 631 (1930). Nor can Dr. Agosta, having declined to read the document, now be heard to say that he was misled or defrauded in connection

with signing the document, *Leasing Service Corp. v. Graham*, 646 F. Supp. 1410, 1415 (S.D.N.Y. 1986).

POINT III: The agreements were sufficiently memorialized so as to fulfill the writing requirement under the Statute of Frauds.

It is noted that New York law construes contracts according to the objective theory of contracts whereby a party's manifestations of intent are viewed from the vantage point of a reasonable person in the position of the other party. *Brown Bros. Electrical Contractors, Inc., v. Beam Construction Corp.*, 41 N.Y.2d 397, 399-400, 361 N.E.2d 999, 1001, 393 N.Y.S.2d 350, 351-52 (1977).

The FAST 14 February 2012 Shareholder's meeting, attended by Dr. Agosta, was memorialized by a court reporter who was in attendance [AA429 - AA461, plus relevant Exhibits]. Annexed to the court reporter's transcript was Exhibit 3, the Minutes to the FAST Annual Shareholders' Meeting of 25 January 2012. [AA109 - AA111] [5] The Minutes to that meeting, in turn, included the text of an e-

[5] The Minutes to the 22 January 2012 Shareholder's Meeting, while entered as an Exhibit annexed as part of the record of the 25 January 2012 meeting, were included in the Appellant's Appendix as an Exhibit to the Defendant's Answer, where they also were presented before the

mail exchange that occurred three days previously, on 22 January 2012, regarding the terms and conditions of Dr. Agosta's relationship with FAST [AA108.1 - AA108.3].

Not only did Dr. Agosta agree to enter the minutes of the 25 January 2012 meeting into the record of the 14 February meeting, but he himself seconded the motion to dispense with the reading of the minutes from the 25 January 2012 meeting [AA435, lines 8 - 11]. The record of the 14 February meeting is replete with active participation by Dr. Agosta. The record of the 14 February meeting is also replete with actions and references to actions taken by FAST in going forward with the proposed development and monetization of Dr. Agosta's invention.

The minutes of the meeting satisfied the Statute of Frauds requirement. *See, e.g. Northstream Investments, Inc., v. 1804 Country Store Co.*739 N.W.2d 44, 50 - 51 (S. Dak. 2007); *Scherer v. Laborers International Union*, 746 F. Supp. 73, 85 (N.D. Fla. 1988); *see also DFI Communications, Inc. v. Greenberg*, 51 A.D.2d 403, 406, 381 N.Y.S.2d 880, 883 (1st Dept. 1976), *modified on other grounds* 41 N.Y.2d 602, 363 N.E.2d 312, 394 N.Y.S.2d 586 (1977). Meeting minutes

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Court below. Additional placement of the 22 January 2012 Minutes following the Transcript of the 25 January 2012 Meeting would be undesirable and redundant surplusage, *see* CPLR R 5528(5).

evidencing oral agreement, together with partial performance, serve to estop the application of the Statute of Frauds defense. *Young v. Pleasant Dale Park District*, 1986 U.S. Dist. LEXIS 24389 at *3 (N.D. Ill. 1986).

That the meeting minutes were memorialized by a court reporter makes them especially reliable and suitably compliant with any statute of frauds requirement. *Beach v. Anderson*, 417 N.W.2d 709 (Minn.App. 1988), *review denied* 1988 Minn. LEXIS 509 (Minn. 1988).

The *Spirt* and *Gupta* cases cited in the Appellants' Brief are inapposite because the parties in those cases did not stand in fiduciary relationships as Dr. Agosta stood with respect to FAST. On account of his fiduciary relationship to FAST, Dr. Agosta's acquiescence, if not active participation, in the activities of FAST towards exploiting and developing his patents must be viewed in light of his fiduciary relationship with respect to FAST.

POINT IV: The Plaintiffs/Appellants did not overcome the presumption that the USPTO record is correct.

The Appellant appeals "from every part" of the Judgment of the Court below [AA2]. This includes the denial of summary judgment for the Plaintiffs/Appellants with respect to their Seventh Cause of Action, declaring that the Plaintiff holds "the entire ownership interest" in a patent [AA36, ¶ 39].

The records and deliberations of the U.S. Patent and Trademark Office ("USPTO") reflect that FAST holds title to the invention [RA13 - RA14]. Government records are presumed correct, and the challenger bears burden of proving otherwise. *Chrysler Corp. v. United States*, 604 F.3d 1378, 1380 - 1381 (Fed.Cir. 2010). This presumption of correctness applies to USPTO records and decisions, *see, e.g. Brooktree Corp. v. Advanced Micro Devices, Inc.*, 977 F.2d 1555, 1574 - 1575 (Fed. Cir. 1992), *reh'g denied* 1993 U.S. App. LEXIS 415 (Fed. Cir. 1993), and applies to Certificates of Correction issued by the USPTO, which are part of the patents themselves, *Superior Fireplace Co. v. Majestic Products Co.*, 270 F.3d 1358, 1366 - 1367 (Fed. Cir. 2001), *reh'g denied* 2002 U.S. App. LEXIS 2623 (Fed. Cir. 2002). This presumption of correctness must be overcome by clear and convincing evidence, which the Plaintiffs have failed to present, *Id.* That the Court below saw fit to note the persistence of ambiguities in the nature of

the Assignment of Invention document indicates that the evidence presented by the Appellant to the Court below, if it did demonstrate ownership of the patent in any entity other than FAST, did not and could not have risen to the requisite "clear and convincing" level.

Moreover, following the 15 December 2011 assignment of the invention, Dr. Agosta participated in the activities of as though FAST did in fact hold the invention, including participation in presentations to obtain funding and business connections [RA004 - RA012]. The actions of Dr. Agosta in the months following his execution of the document are reflective of his status mentis and mindset, and indicate that his true intent at the time he signed the document (and entered into other aspects of the transactions with FAST) was to repose the rights to the invention in FAST. *See, e.g. Slatt v. Slatt*, 64 N.Y.2d 966, 477 N.E.2d 1099, 488 N.Y.S.2d 645 (1985). Dr. Agosta's failure to disavow the assignment of the invention, as well as his acquiescence if not actual participation in FAST's activities, including those at the 14 February 2012 Shareholder's meeting, serve only to confirm the presumption that the USPTO record is correct.

POINT V: The Lower Court's denial of Summary Judgment to the Defendant does not necessarily foreclose the Defendant prevailing on the issues:

It must be remembered that "the purpose of summary judgment is to determine whether there are genuine issues necessitating a trial." *Construction by Singletree, Inc. v. Lowe*, 55 A.D.3d 861, 863, 866 N.Y.S.2d 702, 704 (2d Dept. 2008). "[D]enial of summary judgment means only that the case should be heard by the trier of fact, and cannot be resolved as a matter of law," *In re Salim*, 2015 Bankr. LEXIS 815 at *25 - *26 (Bankr., E.D.N.Y. 2015).

"[Summary judgment] does not deny the parties a trial; it merely ascertains that there is nothing to try. Rather than resolve issues, it decides whether issues exist. As is often said of the motion, issue finding rather than issue determination is its function." *Laura LL v. Robert LL*, 186 Misc. 2d 642, 643 - 644, 719 N.Y.S.2d 823 (Family Ct., Albany Co. 2000) (*quoting* SIEGEL, NY PRACTICE § 278, at 438 [3d ed].[6]). The purpose of summary judgment "is to encourage judicial economy by eliminating unnecessary trials," *Cole v. Flathead County*, 771 P.2d 97, 100 (Mt. 1989).

[6] The 5th Edition of the late Prof. Siegel's magnum opus continues to carry the same passage verbatim. SIEGEL, NEW YORK PRACTICE § 278, at 476 [5th ed].

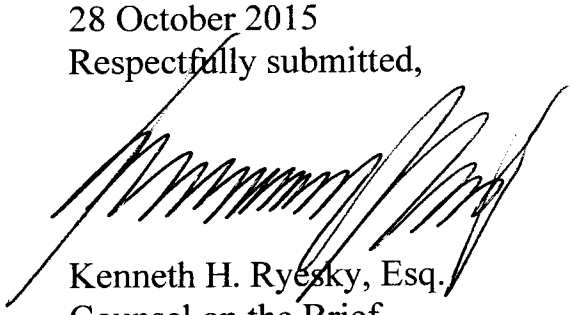
It is further noted that "the doctrine of the law of the case is flexible, not an inescapable straightjacket." *Garcia v. City of New York*, 104 A.D.2d 438, 478 N.Y.S.2d 957 (2d Dept. 1984), *aff'd* 65 N.Y.2d 805, 482 N.E.2d 923, 493 N.Y.S.2d 127 (1985).

The Appellant's brief reads inconsistencies in the lower court's respective treatments of the various claims and counterclaims [Appellant's Brief at 34]. The inconsistencies imagined by the Appellant may well cut either way, and any that be viewed as an error to the detriment of the Appellant could just as well be a lower court error to the detriment of the Respondent/Defendant. In the context of summary judgment, "the perception of whether or not the papers raise an issue of fact sufficient to ground the judgment should be measured is not the product of book-learned verbalizations of criteria, but of the judge's total experience on the bench, and before that, at the bar." SIEGEL, NEW YORK PRACTICE § 278, at 477 [5th ed].

CONCLUSION:

For the reasons set forth above, the Appellant's appeal should be denied in its entirety.

28 October 2015
Respectfully submitted,



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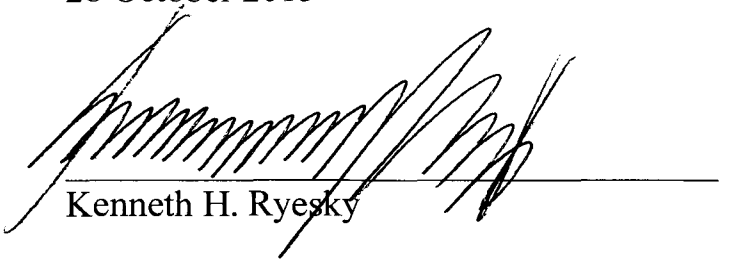
CERTIFICATION OF COMPLIANCE

I, Kenneth H. Ryesky, an attorney admitted to practice before the Courts of the State of New York, do hereby certify that the foregoing brief was prepared by me on a computer in compliance with 22 NYCRR § 670.10.3, *viz.*, using double-spaced 14-point Times New Roman typeface in the main body (except for headings and quotations exceeding two (2) lines) and 12-point Times New Roman typeface in the footnotes; and that the total word count of the instant brief, inclusive of this Certification, is 4,694.

28 October 2015



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